Nos. 17, 18 and 19.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

THE UNITED STATES OF AMERICA, *Appellant*,

v.

CRESCENT AMUSEMENT COMPANY ET AL.

CRESCENT AMUSEMENT COMPANY ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA.

MEMORANDUM OF CRESCENT AMUSEMENT COMPANY ET AL. IN OPPOSITION TO MOTION OF MORRIS L. ERNST, ESQ. AS ATTORNEY FOR THE SOCIETY OF INDEPENDENT MOTION PICTURE PRODUCERS, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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Of Counsel.

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May It Please the Court:

We have declined to give consent to the filing of the proposed brief* and we oppose the motion for leave to file same on the following grounds:

* Defendants' counsel definitely declined this consent on the same day that they received and read the page proofs referred to in paragraph 2 of the Motion. No prior draft of the brief was submitted in any form whatever. This statement is made to clarify the statements contained in paragraph 2 of the Motion.

1. It is said at the top of page 3 of the brief that the "vital stake" of so-called independent producers of motion pictures and the movie-going public "is implicit in the record", although the actual issue in the case was the alleged suppression of the competition of independent exhibitors.

If and when the Government, or a private litigant, brings a suit in which the interests of producers and the theatre-going public are *actually* rather than *implicitly* involved, it will be time to develop the relevant facts in a judicial proceeding with appropriate pleadings and evidence, and argue the questions which are raised. In the present case there was no attempt to develop such facts and it seems clear that the Court cannot base a judicial opinion on matters which are thought to be "implicit" in a record prepared on entirely different issues. The opinion of Circuit Judge Frank in *United States* v. *Forness* (C. C. A. 2, 1942), 125 F. (2d) 928, at pages 942-943 (some of which is quoted at pages 79-80 of our main brief) is pertinent as to the grave importance of basing decisions on the right facts.

2. The brief writer makes numerous assertions, in general phrases, as to what the record shows. For example, at the bottom of page 4 it is said that defendants' arguments "are flatly refuted by the facts of record in this case", although no citation to the record is made. Even where citations to the record are made, particularly on pages 20 and 23-24 of the brief, a reference to the pages of the record which are cited will reveal that the brief writer has engaged in a rather reckless form of wishful thinking as to the facts in the case at bar. He has assumed facts to fit the legal theories which are propounded and then has sought to read these assumed facts into the record. The Government is at least content to rely upon the Findings made by the District Court. The present brief writer is not content even with these Findings.

3. An order in the present case permitting the filing of this brief would make it incumbent upon defendants to file

a reply brief. The issues which would be discussed are so far afield from the actual issues in this case that, in our view, it would be of no help to the Court to debate them. On the other hand, if the so-called independent producers,—who actually distribute their pictures through one or more of the major distributors, such as United Artists,—have a cause of action for treble damages against the defendants in this case (as suggested at pages 20-22), they should bring such a suit and test out their legal theories in a proper forum.

Respectfully submitted,

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